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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D C 20554

Re: ***Notice of Ex Parte Presentation***
CC Docket Nos. 96-262 and 01-92

Dear Ms Dortch:

ITC^DeltaCom Communications, Inc ("ITC^DeltaCom") and Sprint Corporation ("Sprint") urge the Commission to issue promptly a decision rejecting the petition for declaratory ruling filed by US LEC Corporation ("US LEC") in the CC Docket No 01-92. The record in the above-referenced proceedings is fully developed, and a prompt decision will ensure that US LEC's access charge practices are terminated before they can inflict more damage on the U S. telecommunications industry

The record is clear that US LEC and perhaps a few other competitive local exchange carriers ("CLECs") are seeking to collect grossly excessive access charges from interexchange carriers ("IXCs") by billing the full benchmark rate for performing a nominal and wholly-unnecessary routing function for CMRS-originating "8YY" traffic without the consent (or, in some cases, knowledge) of the terminating IXC Seeking to exploit a perceived but non-existent loophole in the *CLEC Benchmark Order*, 16 FCC Rcd 9923 (2001), US LEC uses its FCC tariff to impose the full benchmark rate on the IXC, and then US LEC remits a portion of these access charge revenues as a kickback to the originating CMRS provider, who, under *Sprint PCS*, 17 FCC Rcd 13192 (2002), is not entitled to impose interstate access charges on the IXC without a valid contract Through this scam, US LEC has received a windfall worth millions of dollars and increased the costs incurred by IXCs to terminate CMRS-originating "8YY" traffic by more than 600% in some cases

In support of this letter, ITC^DeltaCom and Sprint hereby state as follows:

1 US LEC's practice violates the requirement in section 201(b) that a carrier's charges and practices must be "just and reasonable " 47 U S C. §201(b) US LEC is charging for services that it does not perform, and the FCC has ruled this practice to be unlawful. *E g , AT&T Corp v Bell Atlantic - Pennsylvania*, 14 FCC Rcd 556, ¶32 (1998)

2 If the benchmark rate is a "just and reasonable" rate when a CLEC performs all originating switched access functions for an interstate interexchange call, then charging the same rate for performing some but not all of those functions is excessive by definition and, therefore, is unjust and unreasonable in violation of section 201(b)

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3 US LEC cannot point to a single FCC decision that states or implies that it is lawful for a CLEC to charge the full benchmark rate for providing a transit routing function for CMRS-originating "8YY" traffic Indeed, US LEC cannot point to a single FCC decision that states or implies that it is lawful for a CLEC to impose access charges on an IXC for CMRS-originating traffic without the consent of the IXC

4 Although US LEC and other carriers have asserted (without any evidentiary support whatsoever) that CMRS/CLEC transit routing and access sharing arrangements have been in place for years, they cannot point to a single instance prior to US LEC's petition for declaratory ruling in which any party advised the FCC (or the IXCs) that it was engaging in this practice

5 US LEC engaged in this practice by concealing from IXCs the wireless origination of the "8YY" traffic it delivered and billed to the IXCs In the case of ITC^DeltaCom, US LEC concealed the wireless origination of the "8YY" traffic by sending invoices that identified the traffic as originating on US LEC's network ITC^DeltaCom learned of the wireless origination of the traffic only after a lengthy, expensive and intensive investigation

6 US LEC's practice is inconsistent with the *CLEC Benchmark Order*, 16 FCC Rcd 9923 (2001), in several ways In paragraph 55 and the implementing rule it adopted, the Commission made clear that the benchmark rate was designed as the aggregate, composite rate covering all switched access functions, including the common line, switching and transport The codified rule states unambiguously that the benchmark rate covers "all applicable fixed and traffic-sensitive charges " 47 U S C § 61 26(a)(5) The benchmark rate was not intended to, and does not, apply to any transit routing functions performed by a CLEC

7 The FCC adopted the *CLEC Benchmark Order* to address the perceived problem that certain IXCs were unwilling to provide service to certain CLECs' end-user subscribers because the IXCs believed the CLECs' access rates were excessive The benchmark policy works hand-in-glove with the Commission's holding (*see* paras. 88-94) that IXCs must provide service to a CLEC's end-user subscribers if the CLEC satisfies the benchmark rate and the IXC otherwise serves subscribers in the area The *CLEC Benchmark Order* was not designed to, and did not, address CLEC transit routing practices for traffic that does not involve the CLEC's own end-user subscribers Other parts of the *CLEC Benchmark Order* (*e g* , para 58) confirm that the Commission was concerned only with services offered by CLECs to their end-user subscribers

8 Paragraphs 45 and 57 of the *CLEC Benchmark Order* prohibit a CLEC from using the order as a pretext to increase its interstate switched access rates. Any CLEC that

revised its tariff to charge the full benchmark rate for the type of faux transit routing offered by US LEC violated this key precept

9 The FCC adopted the *CLEC Benchmark Order* to promote numerous policies, including (a) ensuring just and reasonable CLEC access charges; (b) providing certainty for both CLECs and IXCs regarding access costs, (c) addressing certain abusive CLEC pricing practices, (d) eliminating uneconomic CLEC arbitrage incentives; (e) more closely aligning CLEC and ILEC access rates, (f) promoting negotiated access rates between CLECs and IXCs, (g) promoting network efficiency, and (h) placing downward pressure on IXC retail rates US LEC's routing practice undermines each of those policy objectives.

10 US LEC's practice is based upon the position that a CLEC may lawfully charge an IXC the full benchmark rate when the CLEC serves as a transit carrier for routing CMRS-originating "8YY" traffic from the CMRS carrier to the IXC via the ILEC access tandem This position creates the potential for abuse whereby multiple CLECs could insert themselves into the call routing as transit carriers and then impose multiple benchmark rates on the IXC for a single call This "daisy chain" approach is unjust and unreasonable in violation of section 201(b), and demonstrates beyond doubt that the Commission did not intend in the *CLEC Benchmark Order* to permit US LEC or any other CLEC to charge the benchmark rate for providing a mere transit routing function

11 ITC^DeltaCom and Sprint wish to clarify that they are not seeking any order from the FCC that affects the ability of a CLEC to serve as a legitimate transit carrier for CMRS-originating "8YY" traffic, or any other traffic, when the CLEC interconnects directly with the IXC pursuant to a contract between the CLEC and the IXC

12 US LEC relies upon a single sentence in a 1996 *Notice of Proposed Rulemaking* in which the FCC asked parties to submit evidence of any arrangements whereby LECs route CMRS-originating traffic *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 5020, 5075 (1996) (Notice of Proposed Rulemaking) US LEC does not identify any evidence submitted to the FCC in that proceeding regarding these putative arrangements, nor did the Commission adopt any rules or policies favoring or endorsing this practice In *Sprint PCS*, 17 FCC Rcd at 13196, the Commission expressly rejected the contention that this single NPRM reference demonstrates that it is lawful for CMRS carriers to directly or indirectly impose access charges on IXCs without a contract

13 US LEC and others contend that CLECs have performed this routing and billing function for CMRS carriers for many years However, no party has identified a single agreement predating the *CLEC Benchmark Order* in which a CLEC billed access charges to an IXC for traffic that was disclosed to the IXC as CMRS-originating traffic.

14 *Sprint PCS* is a declaratory ruling in which the FCC held that, based on 15 years worth of established FCC and industry practice, a CMRS carrier may not impose access charges on an IXC except through a valid contract with the IXC No party disputes that the *Sprint PCS* ruling is meaningless if a CLEC such as US LEC is permitted to use its Federal tariff to impose access charges on the IXC on behalf of undisclosed CMRS carriers for CMRS-originating traffic

15 US LEC's routing and billing practices do not promote meaningful tandem competition US LEC typically delivers these "8YY" calls to the IXC through ILEC access tandem, and hence US LEC is not competing with the ILEC's tandem services but merely inserting itself as an unnecessary new transmission link in the routing of these calls between the CMRS provider and the IXC

16 US LEC's practice is inefficient and degrades the quality of the "8YY" traffic US LEC has needlessly inserted an additional link into the routing of "8YY" traffic between the CMRS carrier and the IXC, thereby causing more potential points of failure for each "8YY" call

17 US LEC's practice is not a legitimate meet point billing arrangement Such arrangements cannot lawfully exist if, as here, one of the carriers on whose behalf the bill is being sent is wholly undisclosed to the IXC and lacks the ability to unilaterally impose such charges directly on the IXC

18 The issuance of a decision in response to US LEC's petition for declaratory ruling on its billing and routing practices does not implicate the filed rate doctrine In any event, the Commission has repeatedly affirmed that "if a carrier unilaterally changes a rate by filing a tariff revision, the newly filed rate becomes the applicable rate *unless the revised rate is found to be unjust and unreasonable*" *In the Matter of 2000 Biennial Regulatory Review*, 16 FCC Rcd 10647, ¶22 n 57 (2001) (emphasis supplied). The Commission has confirmed that "[w]hile the filed rate doctrine sets the tariffed rate as the 'legal' rate, that rate is not necessarily the 'lawful' rate, an actual finding by the agency or a court of competent jurisdiction that the legal rate is unreasonable 'disentitles the carrier to collection of that rate '" *In the Matter of Communique Telecommunications, Inc* , 14 FCC Rcd 13635, ¶28 (1999) Further, the filed rate doctrine notwithstanding, a tariff is void *ab initio* if it applies an approved rate to a service other than that for which the rate was approved or otherwise implements a practice that contradicts applicable laws and regulations.

19 The Commission must apply any ruling it issues on US LEC's petition to the conduct that US LEC has engaged in It is the well-established practice for the Commission and courts to apply all rulings to the case at hand The Commission should decline to apply a decision retroactively only when the decision clearly replaces a previous rule with a new and

contrary rule. Where the decision does not replace a previous rule, or where the scope and applicability of the previous rule were uncertain or ambiguous, the decision must be applied retroactively in accord with the Commission's practice for decades *E g , Manhattan General Equipment Co v Commissioner*, 297 U S 129, 135 (1936), Clay v Johnson, 264 F.3d 744, 749 (7th Cir 2001), *First National Bank of Chicago v Standard Bank & Trust*, 172 F.3d 472, 478 (7th Cir 1999), *Farmers Telephone Company v FCC*, 184 F.3d 1241, 1250 (10th Cir 1999), *Ptamba Cortes v American Airlines*, 177 F 3d 1272, 1283 (11th Cir 1999), *Sentara-Hampton General Hospital v Sullivan*, 980 F 2d 749, 759 (D.C Cir. 1992)

20 There are no compelling equitable circumstances justifying prospective-only application of this ruling US LEC has been adjudicated of engaging in unlawful practices in the past, and it should not be permitted to retain any benefits from this unattractive behavior here The Commission would only encourage US LEC and other carriers to continue inventing pernicious scams if the Commission does not apply its decisions rejecting these scams retroactively (We would note that US LEC continues to aggressively implement the "8YY" scam and bill IXCs for this traffic right up to the present time) It is our understanding that US LEC has established a reserve in case there should be any liability arising as a result of the Commission's ruling, and, according to its SEC filings, the revenues it earns from these activities constitute some unnamed percentage of its access revenues, which in turn are only 24% of its total revenues It also is possible that US LEC may be able to mitigate any harm by recouping some of its revenue payments to CMRS carriers under these unlawful arrangements. In any event, if an entity is dependent financially upon the windfall revenues it receives from imposing an excessive access charge on IXCs for routing wireless-originating "8YY" calls, the parties question whether the Commission should set aside long-standing practices to protect such a non-viable business plan In the present case and in future compliance cases, any failure by the Commission to enforce sound policy would threaten to undermine the development of a robust, competitive facilities-based local telecommunications industry Those parties who argue otherwise are sacrificing the long-term best interest of the industry for their own short-term financial gain

21 To the extent CMRS carriers would be forced to disgorge revenues received under this unlawful arrangements, none of them would suffer undue harm through retroactive application of the Commission's ruling

22 There are compelling equitable circumstances justifying retroactive application of this ruling Some IXCs, such as ITC^DeltaCom, stopped paying US LEC's invoices after they uncovered this scam, and the total unpaid amount now totals several millions of dollars A prospective-only ruling would unfairly penalize these IXCs by encouraging US LEC to litigate against these IXCs to seek payment of these excessive charges. Further, some CMRS carriers, including Sprint PCS, have refused to engage in this scam in reliance on the *Sprint PCS* ruling and the *CLEC Benchmark Order* They would be unfairly punished if

competing CMRS carriers are permitted to gain a competitive advantage through the kickbacks they received from US LEC or other CLECs who have engaged in this practice

23 The line of cases involving *Trinity Broadcasting of Florida, Inc v FCC*, 211 F 3d 618 (D C Cir. 2000), does not require the Commission to apply any ruling on US LEC's petition prospectively only This line of cases holds that when the Commission imposes a fine on an entity or otherwise deprives it of property, certain due process considerations must be taken into consideration These cases are inapposite here because the Commission's decision on US LEC's petition does not involve taking any punitive action against US LEC or otherwise depriving US LEC of property In any event, US LEC's conduct has always been unlawful under 47 U S C §201(b), as well as applicable FCC precedents, including the *Sprint PCS* decision and the *CLEC Benchmark Order*, so due process considerations would not prevent the FCC from taking punitive actions against US LEC.

24 At a minimum, ITC^DeltaCom and Sprint would not object to a decision by the Commission that is limited to the question whether it is lawful for a CLEC to charge the benchmark rate for the transit routing of CMRS-originating "8YY" traffic, a decision which logically can and should be effective only as of April 27, 2001, the date when the *CLEC Benchmark Order* was released. However, in making such a ruling, the Commission should make clear that it is not deciding whether the putative transit routing practices of CLECs prior to the *CLEC Benchmark Order* were lawful In addition, the Commission may choose not to address at this time whether *Sprint PCS* prevents US LEC from imposing any charge at all for routing CMRS-originating "8YY" traffic to an IXC

Respectfully submitted,

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